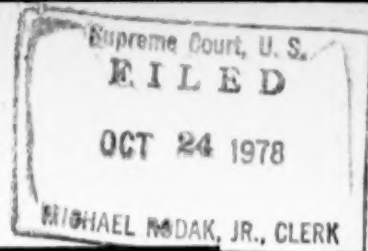


No. 78-147



In the Supreme Court of the United States

OCTOBER TERM, 1978

DENNIS CHAMPAGNE, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1978. The petition for a writ of certiorari was filed on May 26, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court abused its discretion by replacing a juror with an alternate.

2. Whether petitioner should have been granted a mistrial because the dismissed juror mentioned a newspaper article to three other jurors.

3. Whether there was probable cause for the issuance of a warrant to search petitioner's apartment.

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted of possession of an unregistered firearm silencer, in violation of 26 U.S.C. 5861(d) and 5871. Petitioner was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

1. The evidence, the sufficiency of which petitioner does not contest, showed that on April 13, 1977, when officers of the Connecticut State Police executed a warrant issued by a Connecticut Superior Court judge to search an apartment (Tr. 2-4, 26),¹ they discovered petitioner asleep on the living room couch (Tr. 4-6, 10, 27), and found, in addition to other firearms, an automatic pistol and its silencer in a desk located in the living room (Tr. 6-8, 10-11, 13-15). The apartment was leased to Debra Spring, a friend of petitioner (Tr. 85, 104), but petitioner lived there (Tr. 85, 87, 92, 247-249).

2. After the court instructed the jurors, it told them to retire to the jury room but not to begin their deliberations until they received the exhibits. The court then excused the alternate juror (Tr. 317-319). At that point petitioner's counsel requested that the court ask the jurors whether

¹"Tr." refers to the pages of the trial transcript. The affidavit and warrant are included as an Appendix, *infra*.

they had read in that morning's newspaper an article² which mentioned petitioner by name and stated in part that police had confiscated marijuana and other contraband in a series of raids and that a government witness had been threatened (Tr. 321). The court immediately recalled the jury (which had not begun its deliberations) and inquired if any juror had read the article. Juror Champigny stated that he had read the article, and the court immediately sent for the alternate juror (Tr. 323). Champigny was discharged by the court and replaced, over petitioner's objection, by the alternate juror (Tr. 323, 326, 340-343).

The court also asked each juror if Champigny had discussed the case with them (Tr. 324-326). Three jurors who said that Champigny had mentioned the article to them were questioned separately by the court with petitioner's counsel, out of the presence of the other jurors (Tr. 328-337). Juror Christensen stated that Champigny had told her he had read that " * * * there were a lot of things connected, dope and so forth." Christensen then told Champigny to "forget it" and was angry that he had

²The allegedly prejudicial passages of the article are as follows (Appellant's Appendix 14a):

¹Authorities said a state trooper early in the day heard a threat by an unidentified club member against government witness Edward "Spanky" Correia, who received \$1,400 for being an informer against the club.

* * * * *

The raid was one of four police made that day in Bridgeport and Stratford, culminating in the arrest of eight Hun members and three of their girlfriends.

Police said they confiscated 50 weapons, large amounts of ammunition, thousands of pills, 30 pounds of marijuana and various other contraband. Charges against Champagne and other defendants are pending in Bridgeport's Superior Court.¹

Except for the evidence that other firearms were recovered, none of this information was before the jury.

told her about the article because the court had instructed the jurors not to read the papers (Tr. 328-331). Juror Archambault said that Champigny had told her that he read the article, but she was unaware of its contents because she had refused to engage in any discussion pursuant to the court's instruction that the jury not read or listen to anything concerning the case (Tr. 324, 331-334). Juror O'Connor said that Champigny told her and juror Archambault that a newspaper article said "[t]hey got those fellows on a lot of things." O'Connor said she and Archambault became "nervous" and Archambault told Champigny "I don't want to hear anything," at which point no further conversation concerning the article or the case occurred (Tr. 334-337).

Each of the three jurors told the court she could reach an impartial verdict and had not been influenced by what Champigny had said (Tr. 330, 334, 335, 337). The alternate juror, who had in the meantime been recalled, also told the court she had not read, overheard, or discussed anything concerning the case since being discharged, that she was unaware of anything Champigny had said, and that she could render a fair and impartial verdict (Tr. 340-342).

The court seated the alternate juror and denied petitioner's motion for a mistrial made on the grounds that the jury had been prejudiced by Champigny's statements and that the alternate juror should not be allowed to replace Champigny since she had been discharged (Tr. 343).

ARGUMENT

1. Petitioner first argues (Pet. 5-8) that the trial judge violated Rule 24(c), Fed. R. Crim. P., by replacing Champigny with an alternate juror after the jury had been ordered to retire.

A trial court has broad discretion to replace a regular juror with an alternate whenever the court has reasonable cause to believe that "a juror's ability to perform his duty has become impaired." *United States v. Floyd*, 496 F. 2d 982, 990 (2d Cir.), cert. denied, 419 U.S. 1069 (1974). Accord, *United States v. Bad Cob*, 560 F. 2d 877, 879 (8th Cir. 1977); *United States v. Smith*, 550 F. 2d 277, 285-286 (5th Cir.), cert. denied, 434 U.S. 841 (1977); *United States v. Pappas*, 445 F. 2d 1194, 1202 (3d Cir.), cert. denied, 404 U.S. 984 (1971); *United States v. Ellenbogen*, 365 F. 2d 982, 989 (2d Cir. 1966), cert. denied, 386 U.S. 923 (1967); *United States v. Collier*, 362 F. 2d 135 (7th Cir.), cert. denied, 385 U.S. 977 (1966). Here the court acted well within its discretion by discharging a juror who, in violation of its instructions, had read and mentioned to other jurors a potentially prejudicial newspaper article concerning the case.

The replacement of the discharged juror by the alternate clearly did not violate Rule 24(c), Fed. R. Crim. P., which provides, in part, that "[a]lternate jurors * * * shall replace jurors who, prior to the time the jury retires to consider its verdict," are discharged. The jury had retired⁴ to the jury room only a few moments before they were recalled by the court, and, in accordance with the court's instructions to wait until they received the exhibits, had not begun their deliberations (Tr. 317-319, 322, 344-345). Thus Champigny, who was discharged, did not participate in any deliberations, and the alternate juror was not absent during any deliberations. Since the jury did not begin to "consider its verdict" before the alternate replaced the regular juror, Rule 24(c) was not

⁴Petitioner's counsel had read the article shortly before the court told the jury to retire (Tr. 321-322). Had counsel raised this issue before the jury had retired, he would have avoided any possibility of error, as the court noted at the time (Tr. 321).

violated. Accord, *United States v. Cohen*, 530 F. 2d 43, 48 (5th Cir.), cert. denied, 429 U.S. 855 (1976).⁵

2. Petitioner also claims (Pet. 5, 8) that juror Champigny's mention of the newspaper article required a mistrial because jurors may have been exposed to potentially prejudicial matters. However, a trial court has considerable discretion in its choice of appropriate corrective measures. See, e.g., *United States v. Hankish*, 502 F. 2d 71, 77 (4th Cir. 1974); *Margoles v. United States*, 407 F. 2d 727, 735 (7th Cir.), cert. denied, 396 U.S. 833 (1969). The court here acted swiftly to determine if any juror had read the allegedly prejudicial article and properly discharged the only juror who had read it. The court's further questioning of the jurors who heard Champigny mention the article established they had not been prejudiced. Under these circumstances, the trial court properly ruled that the incident did not prevent the jurors from rendering an impartial verdict. See, e.g., *United States v. Wilburn*, 549 F. 2d 734, 739 (10th Cir. 1977); *United States v. Burke*, 506 F. 2d 1165, 1170 (9th Cir. 1974), cert. denied, 421 U.S. 915 (1975); *United States v. Hamilton*, 490 F. 2d 451 (5th Cir. 1974); *Hall v. United States*, 396 F. 2d 428, 429-430 (10th Cir.), cert. denied, 393 U.S. 986 (1968); *United States v. Collier*, *supra*; *Edmonds v. United States*, 273 F. 2d 108, 115 (D.C. Cir. 1959), cert. denied, 362 U.S. 977 (1960). The matter requires no further review by this Court.

⁵Petitioner's reliance (Pet. 7) upon *United States v. Beasley*, 464 F. 2d 468 (10th Cir. 1972) is misplaced. There the alternate juror participated in the deliberations with the 12 regular jurors, and the court of appeals held that participation of the 13th juror destroyed "the sanctity of the jury" and required a mistrial (*id.* at 470).

3. Finally, petitioner argues (Pet. 8-16) that the affidavit in support of the search warrant did not establish probable cause because it did not show that the informant was reliable and had acquired his information in a reliable manner.

As this Court indicated in *Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964), an affidavit for a search warrant based upon the unsworn information of a confidential informant must provide a basis for concluding that the informant is reliable and that he acquired his information in a reliable manner, to preclude the possibility that the information is based merely upon rumor or speculation. The police officer's averment in the April 1977 warrant application that the confidential informant "has been reliable on numerous occasions in the past, the last time being June 1976, which resulted in a February 1977 conviction in a felony case" (App., *infra*, 2a) was sufficient to establish the informant's reliability. See, e.g., *Jones v. United States*, 362 U.S. 257, 268-269 (1960); *Draper v. United States*, 358 U.S. 307, 309 (1959). Moreover, the averment that the informant had personally observed controlled drugs and various firearms in petitioner's apartment established a reliable basis for his information.

Petitioner's argument that information leading to only one conviction is insufficient to establish the informant's reliability (Pet. 11) is not well founded. The warrant application stated that the informant "has been reliable on numerous occasions in the past * * *." In any event, averments of past reliability do not require a showing that the informant's information led to any convictions. See, e.g., *Jones v. United States*, *supra*, 362 U.S. at 268; *Draper v. United States*, *supra*, 358 U.S. at 309; *United States v. Spach*, 518 F. 2d 866, 872 (7th Cir. 1975); *United States ex*

rel. Washington v. Yeager, 448 F. 2d 87, 89 (3d Cir.), cert. denied, 404 U.S. 967 (1971); *Jones v. Crouse*, 447 F. 2d 1395, 1398-1399 (10th Cir. 1971), cert. denied, 405 U.S. 1018 (1972). Petitioner's contention that personal observations are not sufficient to establish the reliability of the information unless corroborated is likewise without merit. Such allegations of personal observations assure that the information is not based on rumor or surmise, and they need not be corroborated to establish reliability. See, e.g., *United States v. Harris*, 403 U.S. 573, 579, 581 (1971); *Spinelli v. United States*, *supra*, 393 U.S. at 416; *United States v. Moore*, 522 F. 2d 1068, 1073 (9th Cir. 1975), cert. denied, 423 U.S. 1049 (1976); *United States v. Perry*, 380 F. 2d 356 (2d Cir.), cert. denied, 389 U.S. 943 (1967).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOSEPH S. DAVIES, JR.
FRANK J. MARINE
Attorneys

OCTOBER 1978

APPENDIX

[AFFIDAVIT OF PROBABLE CAUSE]

STATE OF CONNECTICUT SUPERIOR COURT

TO: A Judge of the Superior Court

The undersigned, being duly sworn, complains on oath that the undersigned has probable cause to believe that certain property, to wit[:]

Stolen motorcycles, stolen handguns, rifles and shotguns, marijuana, barbituates, amphetamines, cocaine, hallucinogenics, controlled drugs, narcotic drugs, marijuana smoking pipes, rolling papers, scales, plastic bags, capsules, white powders, glassine envelopes, brown envelopes, monies, records of drug transactions.

is possessed, controlled, designed or intended for use as a means of committing the crime of[:]

Possession of stolen property and possession of controlled drugs with the intent to sell.

* * * * *

And is within or upon a certain person, place, or thing, to wit[:]

Apartment 1004, Park Towers Apartments, 120 Huntington Turnpike, Bridgeport, Connecticut. The apartment is on the tenth floor. Also a carport and storage area located on the ground floor, rear, of the Park Towers Apartments, 120 Huntington Turnpike, Bridgeport, facing east at the rear of the building to the northernmost corner of the building. Also all persons within the premises.

And that the facts establishing the grounds for issuing a Search and Seizure Warrant are the following[:]

1. The affiants, Trooper Richard D. OBrien [sic] and Trooper Nicholas S. Barone, are both members of the Connecticut State Police Department and are both assigned to the Criminal Intelligence Division of the Connecticut State Police Department. That Trooper OBrien has five years police experience, of which the past six months have been spent exclusively in the investigation of motorcycle gangs. That Trooper Barone has nine and one half years police experience, of which the past two years has been spent exclusively in the investigation of motorcycle gangs.
2. That, on April 8, 1977, Trooper OBrien and Trooper Barone met with a reliable confidential informant, who has been reliable on numerous occasions in the past, the last time being June 1976, which resulted in a February 1977 conviction in a felony case.
3. That, on April 8, 1977, the informant advised the affiants that on April 7, 1977, the informant was in Apartment 1004, Park Towers Apartments, 120 Huntington Turnpike, Bridgeport and that the apartment is the residence of Dennis A. Champagne, AKA "Red", d.o.b. November 4, 1944. That, while the informant was in the apartment, the informant observed controlled drugs, handguns and rifles. That the informant also advised the affiants that the informant also observed in the storage area for the tenants of the Park Towers Apartments, which is shared by all tenants of the building, approximately fifteen Harley Davidson motorcycles. That the informant further advised the affiants that the informant has personal knowledge that these motorcycles are stolen and were put in the storage area by Dennis A. Champagne, AKA "Red", President of the Bridgeport Chapter of the Huns Motorcycle Club.

4. That, on April 11, 1977, the informant advised the affiants that the aforementioned motorcycles were still in the storage area of the Park Towers Apartments.
5. The affiants, based on their experience, training and knowledge of outlaw motorcycle gangs and their related criminal activities (paragraph no. 1), the observations by, and subsequent conversations with the informant (paragraphs no. 3 and no. 4), and the previously established reliability of the informant (paragraph no. 2), believe that, located within the aforementioned premises, to wit, Apartment 1004, Park Towers Apartments, 120 Huntington Turnpike, Bridgeport, and the storage area located on the ground floor of the building, are stolen motorcycles, stolen handguns and rifles, and controlled drugs.

The undersigned has not presented this application in any other court or to any other judge.

Wherefore the undersigned prays that a warrant may issue commanding a proper officer to search said person or to enter into or upon said place or things, search the same, and take into custody all such property.

Signed at BRIDGEPORT, Connecticut, this 12th day of April, 1977 /s/ Tpr. Richard D. O'Brien

Signed at BRIDGEPORT, Connecticut this 12th day of April, 1977 /s/ Tpr. Nicholas S. Barone

JURAT Subscribed and sworn to before me this 12th day of April, 1977 (A Judge of the Superior Court)

/s/ Irving Levine

STATE OF CONNECTICUT

SUPERIOR COURT

The foregoing Affidavit and Application for Search and Seizure Warrant having been presented to and been considered by the undersigned, a Judge of the Superior Court, the undersigned (a) is satisfied therefrom that grounds exist for said Application, and (b) finds that said Affidavit establishes grounds and probable cause for the undersigned to issue this Search and Seizure Warrant, such probable cause being the following: From said Affidavit, the undersigned finds that there is probable cause for the undersigned to believe that the property described in the foregoing Affidavit and Application is within or upon the person, if any, named or described in the foregoing Affidavit and Application, or the place or thing, if any, described in the foregoing Affidavit and Application, under the conditions and circumstances set forth in the foregoing Affidavit and Application, and that, therefore, a Search and Seizure Warrant should issue for said property,

NOW THEREFORE, by Authority of the State of Connecticut, I hereby command any Police Officer of a regularly organized police department or any State Policeman to whom these presents shall come within a reasonable time after the date of this warrant to

enter into or upon and search the place or thing described in the foregoing Affidavit and Application, to wit:

Apartment 1004, Park Towers Apartments, 120 Huntington Turnpike, Bridgeport, Connecticut. The apartment is on the tenth floor. Also a carport and storage area located on the ground floor,

rear, of the Park Towers Apartments, 120 Huntington Turnpike, Bridgeport, facing east at the rear of the building to the northernmost corner of the building. Also all persons within the premises.

* * * * *

for the property described in the foregoing Affidavit and Application, to wit:

Stolen motorcycles, stolen handguns, rifles and shotguns, marijuana, barbituates, amphetamines, cocaine, hallucinogenics, controlled drugs, narcotic drugs, marijuana smoking pipes, rolling papers, scales, plastic bags, capsules, white powders, glassine envelopes, brown envelopes, monies, records of drug transactions.

and upon finding said property to seize the same, take and keep it in custody until the further order of the court, and with reasonable promptness make due return of this warrant accompanied by a written inventory of all property seized.

Signed at BRIDGEPORT,

Connecticut, this 12th

day of April, 1977

Signed (A Judge of the Superior Court) Irving Levine

APPLICATION TO DISPENSE WITH REQUIREMENTS

OF P.A. 76-155

RE: Search Warrant application dated April 12, 1977
for a

Certain person place or thing, to wit: Apartment 1004,
Park Towers Apartments, 120 Huntington turnpike,
bridgeport, Connecticut. The Apartment is on the tenth
floor. Also a Carport and Storage Area Located on the
ground floor, rear, of the park towers Apartments 120
Huntigton turnpike, Bridgeport, facing east at the rear of
the building to the Northernmost corner of the building.
Also all persons within the premises.

The undersigned hereby requests the requirements,
pursuant to P.A. 76-155, concerning delivery of
applications for affidavits in support of a search and
seizure warrant be dispensed with for the following
reason(s):

(Check one or more)

The personal safety of a confidential informant
would be jeopardize by giving of a copy of the
affidavits at such time.

The search is part of a continuing investigation which
would be adversely affected by the giving of a copy of
the affidavits at such time.

The giving of such affidavits at such time would
require disclosure of information or material
prohibited from being disclosed by Chapter 959a.

SIGNED _____

The foregoing application is granted.

JUDGE